FILED
MAY 13 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1655

ROBERT LAGORIO, INDIVIDUALLY AND ON BEHALF OF THOSE WHO AT THE CLOSE OF TRADING ON JUNE 21, 1973 HELD FUTURE CONTRACTS FOR JULY, AUGUST SOYBEANS ON THE BOARD OF TRADE OF THE CITY OF CHICAGO,

Petitioners,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO AND FREDERICK G. UHLMANN, THOMAS A. GELDERMANN, DAVID F. GOLDBERG, WALTER M. GOLDSCHMIDT, WILLIAM D. HAGERTY, JR., DANIEL G. KELLY, ARCH J. REIMANN, HOWARD A. STOTLER, LEE B. STERN, ROTCHFORD L. BARKER, SIDNEY C. HAMPER, RICHARD W. ROSE, AND JON VAN WAMBECK, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES WITH THE BOARD OF TRADE OF THE CITY OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IRWIN J. ASKOW,
EDWIN H. CONGER,
WILLIAM V. LUNEBURG,
69 West Washington Street,
Chicago, Illinois 60602,
Counsel for Petitioners.

Quinlan-Warren Printing Company, Chicago • Financial 6-6565

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

ROBERT LAGORIO, INDIVIDUALLY AND ON BEHALF OF THOSE WHO AT THE CLOSE OF TRADING ON JUNE 21, 1973 HELD FUTURE CONTRACTS FOR JULY, AUGUST SOYBEANS ON THE BOARD OF TRADE OF THE CITY OF CHICAGO,

Petitioners,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO AND FREDERICK G. UHLMANN, THOMAS A. GELDERMANN, DAVID F. GOLDBERG, WALTER M. GOLDSCHMIDT, WILLIAM D. HAGERTY, JR., DANIEL G. KELLY, ARCH J. REIMANN, HOWARD A. STOTLER, LEE B. STERN, ROTCHFORD L. BARKER, SIDNEY C. HAMPER, RICHARD W. ROSE, AND JON VAN WAMBECK, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES WITH THE BOARD OF TRADE OF THE CITY OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The above-named petitioners, by their attorneys, Irwin J. Askow, Edwin H. Conger and William V. Luneburg pray that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on February 13, 1976.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 529 F. 2d 1290.

JURISDICTION.

The judgment of the Court of Appeals is dated and was entered on February 13, 1976. The jurisdiction of this court is invoked under 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Did Congress intend to exempt a contract market and its directors from liability under 7 U. S. C. § 13(b) for manipulating the price of a regulated commodity?

2. Must a trader damaged by market manipulation committed by a contract market and its directors specifically allege bad faith in order to recover on his implied right of action under 7 U. S. C. § 13(b)?

STATUTE INVOLVED.

The pertinent part (7 U. S. C. § 13(b)) of the Commodity Exchange Act here involved provides as follows:

> "§ 13 . . .
>
> (b) It shall be a felony punishable by a fine of not more than $100,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate com-

BLEED THROUGH

merce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce."

STATEMENT.

This suit was brought in the district court to recover damages resulting from action taken on June 21, 1973 by the directors of The Board of Trade to limit trading in futures contracts for delivery in July, August, and September, 1973 of soybeans and soybean meal.

The Board of Trade has been designated as a contract market under the provisions of the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*

The jurisdiction of the district court was invoked because a question arises under a law relating to commerce, the Commodity Exchange Act.

The respondents' action permitted owners of the physical commodity to enter into a futures contract to deliver said commodity in July, August or September, 1973, but limited all other trading of such futures to liquidation of existing positions in the market.

The directors' action was taken following receipt of a telegram from the Administrator of the Commodity Exchange Authority stating that "an emergency situation exists in soybeans and soybean meal futures" and requesting the Board to take the action it took.

Shortly after the directors acted a price decline began, and on July 11 the named petitioner was forced by his inability to meet margin requirements to liquidate at a substantial loss.

Following the denial by the Commodity Exchange Commission of the named petitioner's application for the institution of

disciplinary proceedings against the respondents, the district court granted summary judgment in favor of the respondents.

On appeal the court of appeals affirmed the summary judgment. The court of appeals held that the Board is not guilty of market manipulation when it acts in good faith. 529 F. 2d at 1292.

The court of appeals stated that it could not "believe that Congress intended by adopting section 13(b) to impose liability for the good faith performance of regulatory duties imposed" elsewhere in the Act, because it believed a contrary construction "would deter vigorous regulatory action . . ." *Ibid.*

The court of appeals noted that another section of the act regulating manipulative conduct specifically exempted contract markets while the criminal provision (7 U. S. C. § 13(b)) did not. 529 F. 2d at 1292, note 3.

The respondents fall within the definition of a "person" contained in the Act. 7 U. S. C. § 2.

In addition to the section noted by the court of appeals, the Act has other sections applicable only to contract markets or boards of trade or which distinguish between them and other persons. *E.g.*, 7 U. S. C. §§ 7, 7a, 7b, 8(a), 9 and 12.

Following the June 21, 1973 action of the respondents the price of the July, 1973 futures declined by 40% in a two week period. It then rose as sharply as it fell so that when trading in these futures was closed on July 20 the price had returned to its prior level.

The action taken was intended by the Administrator to have a depressant effect on the price of the commodities involved. Because the respondents acted at the request of the Administrator, the court of appeals inferred that their action was one of good faith.

REASONS FOR GRANTING THE WRIT.

In 1923 this court rejected the attack of the respondent board of trade on the constitutionality of this Act. *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. At that time with two justices dissenting the court said:

> "Manipulations of grain futures for speculative profit, though not carried to the extent of a corner or complete monopoly, exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand . . ." 292 U. S. at 39.

In this case the regulatory authorities failed in their duty, but it was the respondents who took the action that produced an abnormal and disturbing temporary fluctuation of price that was not responsive to actual supply and demand. The definition of manipulation in *Cargill, Incorporated* v. *Hardin*, 452 F. 2d 1154, 1163 (8th Cir. 1971) quoted by the court below (529 F. 2d at 1292) is substantially the same as the one used by this court fifty years ago.

Unless the action of the court below in creating an exemption for the respondents from the provisions of 7 U. S. C. § 13(b) is overturned, they will be free to effect unnatural fluctuations of price. This case's importance lies in its demonstrating that self-regulation under an administrative overseer is not sufficient to accomplish the purposes of the Act. Unless the private right of action based on the criminal provisions of the Act is sustained in this case, contract markets will have no incentive in like circumstances to execute their regulatory duties in a non-manipulative manner.

CONCLUSION.

For the reasons stated, we respectfully submit that this petition should be granted.

IRWIN J. ASKOW,
EDWIN H. CONGER,
WILLIAM V. LUNEBURG,
69 West Washington Street,
Chicago, Illinois 60602,
Counsel for Petitioners.

May 13, 1976.

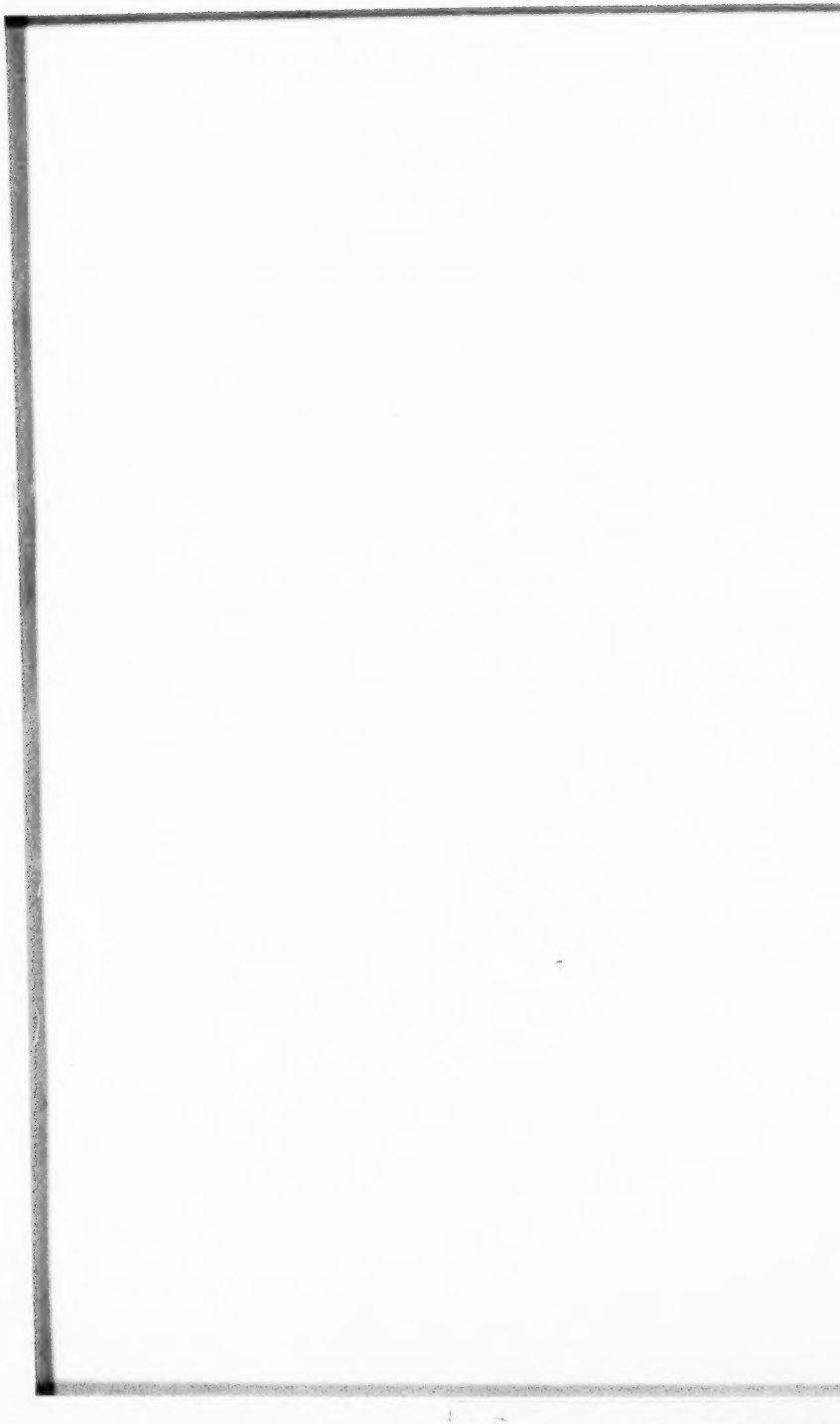
BLEED THROUGH

Appendix

Exhibit A -- Ruling of Commodity Exchange Commission

Exhibit B -- Opinion of Court of Appeals

Exhibit C -- Judgment of Court of Appeals



BLEED THROU

EXHIBIT A

UNITED STATES OF AMERICA
COMMODITY EXCHANGE COMMISSION

Robert Lagorio,

Applicant for the Institution of a Proceeding

vs.

The Board of Trade of the City of Chicago, and Warren W. Lebeck, Owen H. Nichols, Frederick G. Uhlmann, Lawrence J. Blum, Everett E. Klipp, Herman S. Kohlmeyer, Sr., Paul F. McGuire, Ben Raskin, Charles L. Schultz, Edward S. Ronnell, Thomas A. Geldermann, David F. Goldberg, Walter M. Goldschmidt, William D. Hagerty, Jr., Clayton W. Johnson, Daniel G. Kelly, Robert B. Parrott, Arch J. Reimann, James M. Roche, Howard A. Stotler, and Donald B. Walker, as directors, officers, agents, or employees thereof,

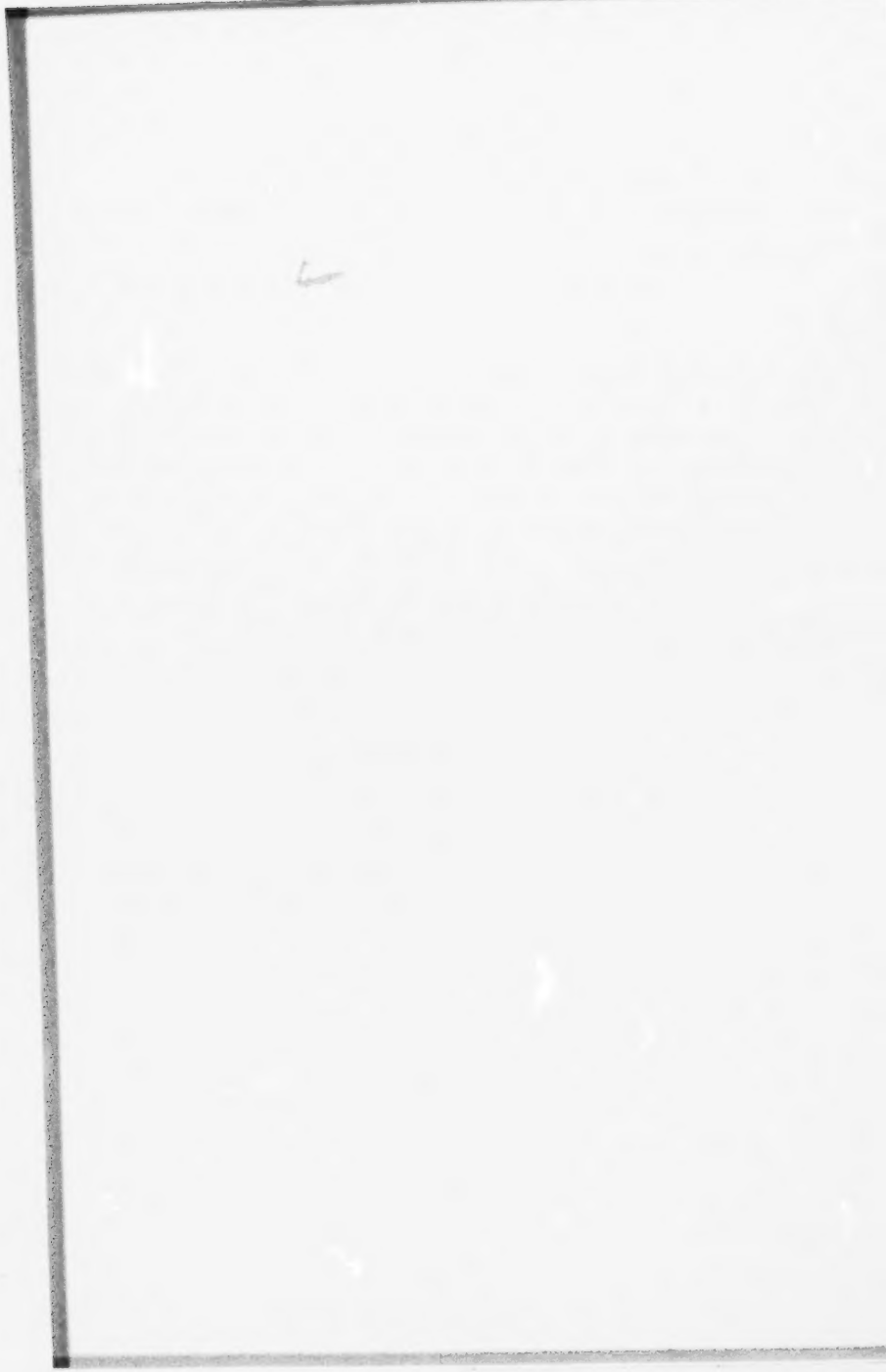
Proposed Respondents

RULING ON APPLICATION FOR INSTITUTION OF A PROCEEDING

Preliminary Statement

Applicant Robert Lagorio has filed an application requesting the institution of such proceeding as is authorized under the Commodity Exchange Act, against the parties named above, pursuant to the rules of practice applicable to disciplinary proceedings before this Commission, 17 CFR §0.53. In the application, Lagorio adopts by reference the allegations contained in a complaint which he filed on October 1, 1973, against the same parties, in the United States District Court for the Northern District of Illinois, Eastern Division, Civil Action No. 73C 2508.

We note parenthetically that the form of pleading in this instance, in which there is such adoption by refer-



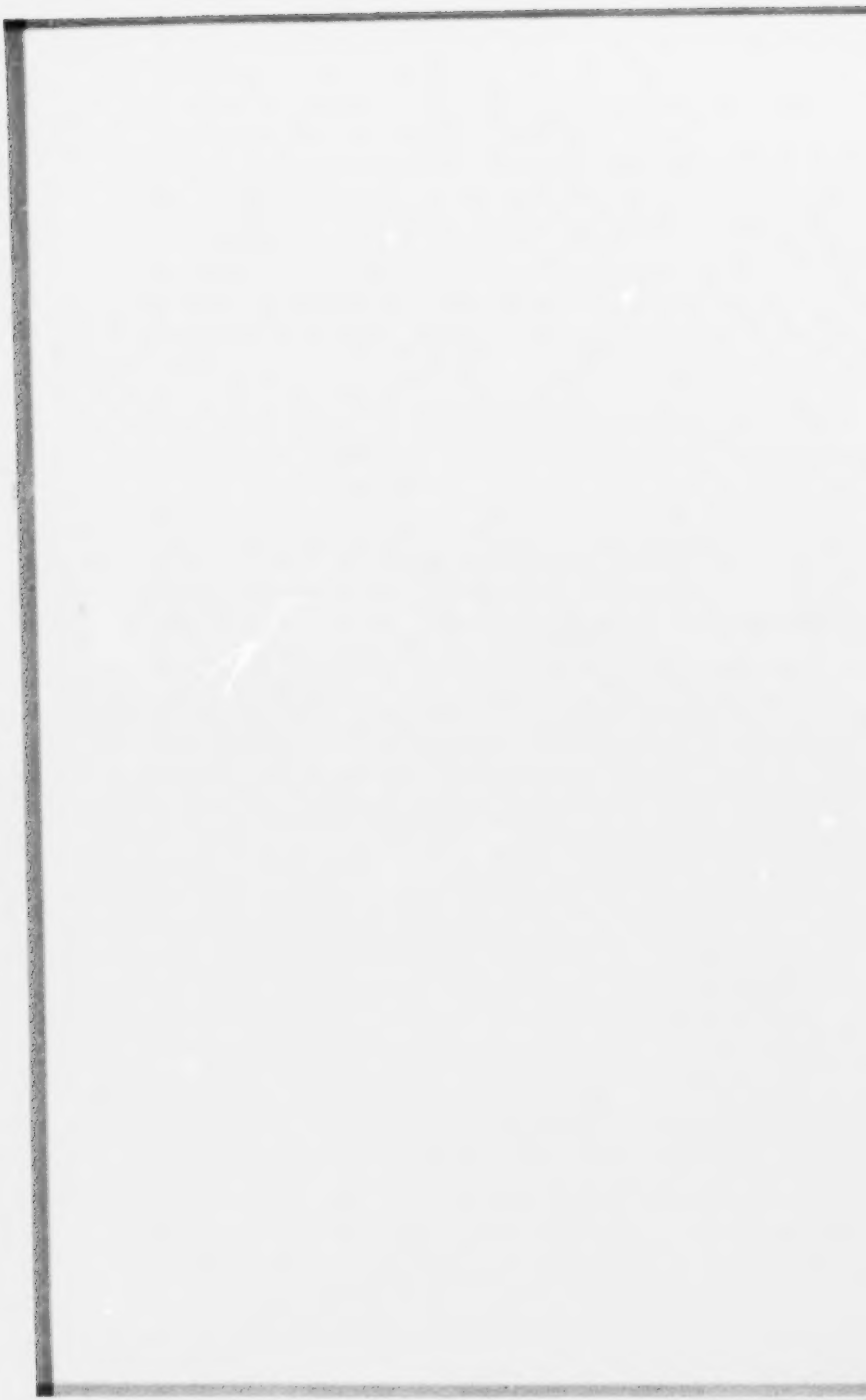
BLEED THROUGH

ence in one document, of allegations contained in another document, does not appear to constitute "a short and simple statement of the facts" within the meaning of 17 CFR §0.53(a). In the future, communications about alleged violations must comply with the rules of practice before this Commission will accept them as applications or issue rulings on them.

The applicant alleges in substance in the court complaint that on June 21, 1973, the defendants limited trading in soybeans on the Board of Trade of the City of Chicago for delivery in July, August and September, 1973, to liquidations of existing positions and new sales for delivery purposes. Specifically, the applicant alleges (Count I, paragraphs 19 and 21):

> 19. Rule 251 [under which the Board of Trade officials purported to act] states no provision giving the Board of Trade emergency powers to limit trading of future contracts for specific purposes other than to stop trading completely, or to regulate deliveries of the actual commodities.
>
> • • • • • • •
>
> This restriction, limiting trading to liquidation only, violated Rule 251 of the Chicago Board of Trade in that it exceeded the stated emergency powers of the Board of Directors since the Board's action did not stop trading entirely, nor regulate delivery of the actual commodity; rather, limited trading was allowed for purposes of liquidating existing contracts, and allowing new sales for delivery purposes.

Applicant further alleges that such limitation of trading had the effect of limiting buyers more than sellers with a consequent "precipitate" fall in the price of soybeans

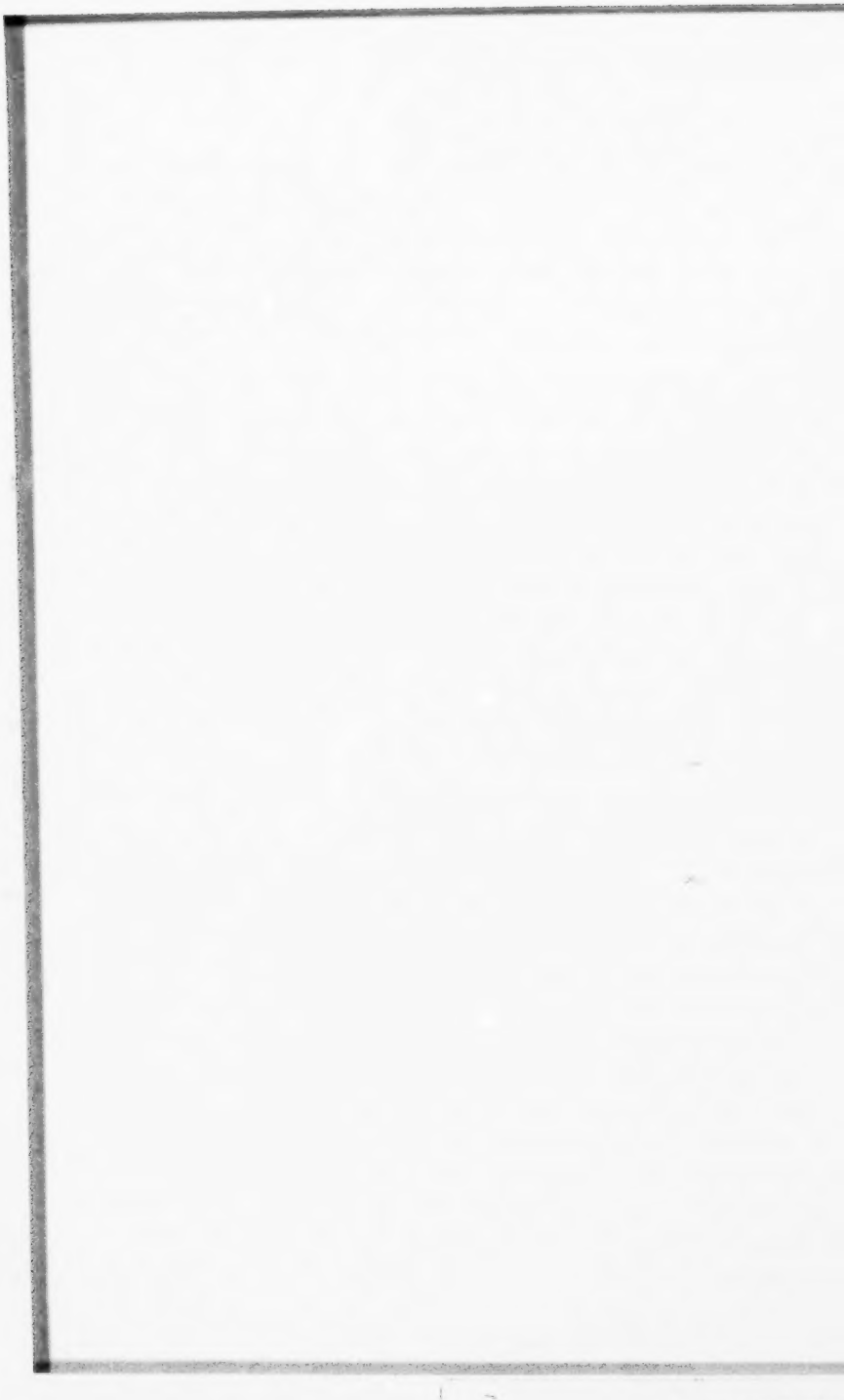


BLEED THROUG

for delivery in those months, and that such limitation of trading was a violation of the rules of the Board of Trade of the City of Chicago and, as such, (Count I) a violation of section 5a(8) of the Commodity Exchange Act and (Count II) a violation of a duty imposed by section 4 of the Commodity Exchange Act.

The applicant filed a memorandum with the Court in the same action, noting a telegram sent by the Administrator of the Commodity Exchange Authority, June 21, 1973, to the Board of Trade of the City of Chicago, requesting the challenged action, but arguing in substance that the challenged action was nonetheless in violation of the Commodity Exchange Act. In that memorandum, the applicant also stated, "[I]t was not necessary to overstep the boundaries or guidelines set out by Rule 251 in the instant situation and that by doing so, the Board themselves are guilty of unauthorized price manipulation to the detriment of all traders."

The defendants in the same court action, the proposed respondents named herein, filed a motion with the Court "that, if judgment is not entered in favor of defendants on all issues as urged in defendants' pending motion for summary judgment and dismissal, this proceeding be stayed until any remaining issue concerning violations of the Commodity Exchange Act has been referred to the Commodity Exchange Commission and its views have been received by this Court." Subsequently, the court action has been continued repeatedly pending receipt from this Commission of a response to the application of Lagorio mentioned above. Accordingly, it is appropriate for this Commission to respond substantively to the application. *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973); *Chicago Mercantile Exchange* v. *Deaktor,* 414 U.S. 113 (1973).



BLEED THROUG

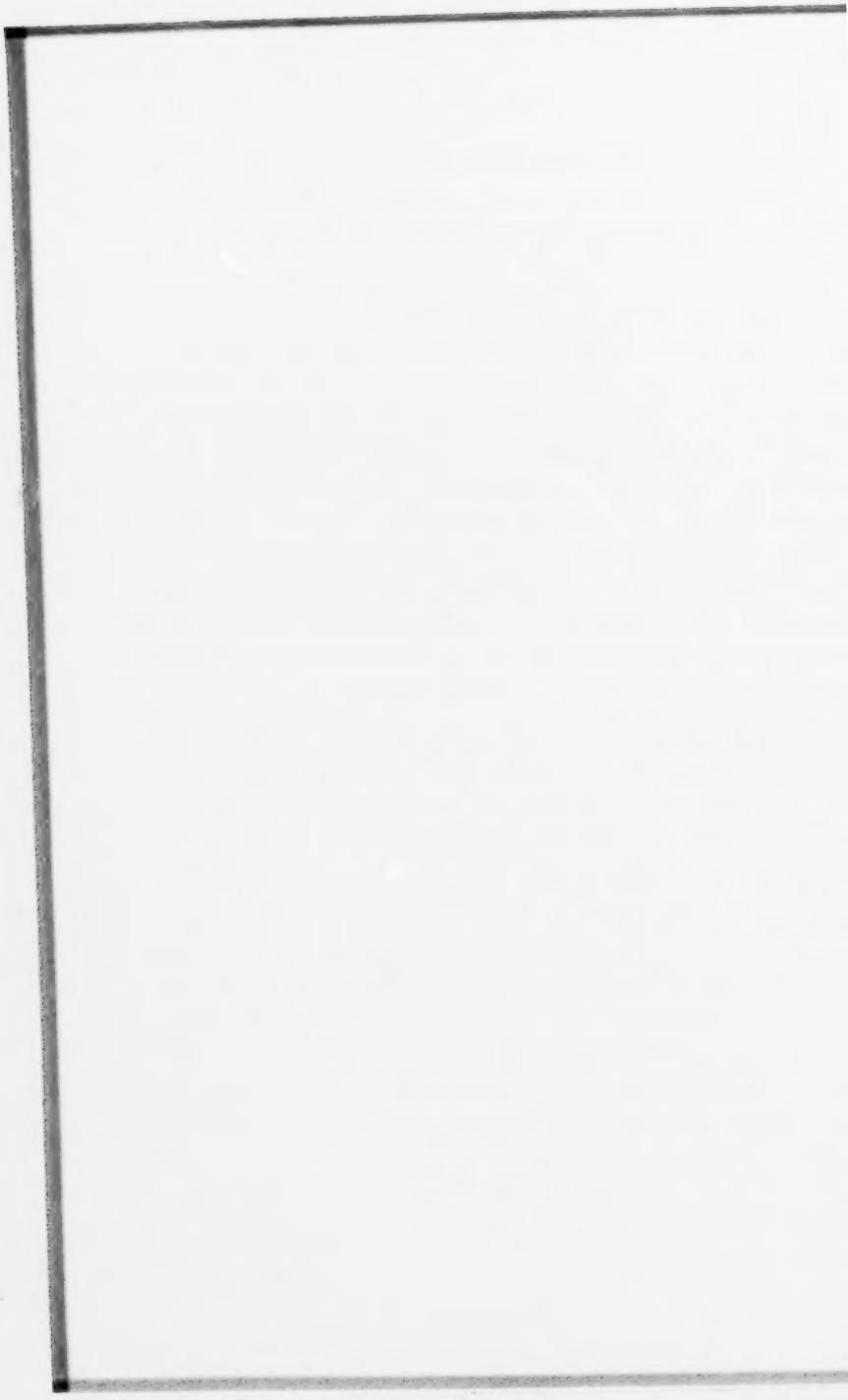
Discussion of Facts

On May 31, 1973, the open position in the old crop soybean futures on the Chicago Board of Trade was 80 million bushels.

On June 19, 1973, the United States Department of Agriculture issued a special supplement to the Agricultural Outlook Digest which was approved by the Outlook and Situation Board. In this report, the Department stated "Worldwide demand for protein meal and the shortage of fish meal are boosting total U.S. soybean usage this season to a record of approximately 1.3 billion bushels, about a tenth above the previous season. This is the fourth consecutive year in which total use exceeds production. Thus, carryover on September 1 will fall to a minimal 40 million bushels, barely enough for two weeks' usage."

Thus, the anticipated carryover on September 1, as reported by the U. S. Department of Agriculture, was only half the open position in soybean futures on the Chicago Board of Trade on May 31, 1973.

Reports filed with the Commodity Exchange Authority by large traders during June 1973 showed that some traders were increasing their long positions in old crop soybean futures, thus creating the potential of an increased demand upon the dwindling supply of soybeans. Under these conditions, it appeared as though excessive price fluctuations in the old crop futures were likely to occur either as a result of market congestion or manipulation.



BLEED THROU

On June 21, 1973, the Administrator of the Commodity Exchange Authority sent the following telegram* to the Acting President of the Board of Trade of the City of Chicago:

> REPORTS SUBMITTED TO CEA REVEAL SUBSTANTIAL NEW LONG POSITIONS BEING ASSUMED IN OLD CROP SOYBEAN FUTURES. WE ARE TOLD THESE POSITIONS ARE IN CONNECTION WITH CASH OPERATIONS. FURTHER, WE ARE TOLD THAT ADDITIONAL BUYING OF SIMILAR CHARACTER IS ANTICIPATED. USDA OUTLOOK AND SITUATION BOARD HAS ANNOUNCED THAT SOYBEAN SUPPLY AS OF SEPTEMBER 1 WILL BE BARELY ENOUGH FOR TWO WEEKS' USAGE AND THAT PROTEIN SUPPLIES ARE QUOTE IN A BIND UNQUOTE. ACCORDINGLY, IN VIEW OF THIS CASH SITUATION, CEA IS OF THE OPINION THAT AN EMERGENCY SITUATION EXISTS IN SOYBEANS AND SOYBEAN MEAL FUTURES. YOU ARE REQUESTED TO TAKE IMMEDIATE ACTION UNDER YOUR RULE 251 OR OTHER APPROPRIATE RULE TO RESTRICT TRADING IN JULY, AUGUST AND SEPTEMBER 1973 SOYBEAN AND SOYBEAN MEAL FUTURES TO LIQUIDATION, EXCEPT FOR NEW SALES FOR DELIVERY PURPOSES.

---

* Section 8a(6) of the Commodity Exchange Act authorizes the Secretary of Agriculture "to communicate to the proper committee or officer of any contract market and to publish, notwithstanding the provisions of section 8 of this Act, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Secretary of Agriculture disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers." The delegation of authority from the Secretary to the Administrator may be found at 7 CFR §§ 2.17(c) and 2.52, 37 F.R. 28463 *et seq.*, December 27, 1972; see also 80 Stat. 379, 5 U.S.C. 301, 302.

BLEED THROUG

Discussion of Law

Rule 251 of the Board of Trade of the City of Chicago, referred to in that telegram, read as follows in June of 1973:

> Emergencies.—The Board shall have power to declare any day to be a holiday or to close the Exchange or to stop trading in any security or in any of the future contracts of any commodity, by reason of any emergency or otherwise, and to make such Regulations in regard to deliveries and settlement prices as it may deem proper because thereof. All Exchange contracts shall be subject to the exercise of such power. Such contracts shall also be subject to the exercise by the Clearing House of the powers reserved to the Clearing House by its Charter, By-Laws, and Resolutions.

Applicants argue in substance that Rule 251 then permitted the Board to halt trading but did not permit it to restrict trading, in an emergency. Substantially the same legal argument was made in *Daniel* v. *Board of Trade of City of Chicago,* 164 F.2d 815 (7th Cir., 1947). See also *Cargill, Inc.* v. *Board of Trade of City of Chicago,* 164 F.2d 820 (7th Cir., 1947).

Those cases involved challenges of certain actions of the Board of Trade of the City of Chicago and its clearing house organization and officials. Those actions were taken in the Spring of 1946, in an emergency created by action of the Office of Price Administration. The action in question was defended under Rule 251, which was then in substantially the same form as it was in June of 1973 (it did not then contain the sentence, "All exchange contracts shall be subject to the exercise of such power.") Both cases were decided on the same day by the same three judges.

BLEED THROUG

It is clear from the two court opinions that while two of the regulations issued under Rule 251 (#1894 and #1899) were literal applications of Rule 251, stopping trading except for purposes of liquidation and making regulations in regard to deliveries and settlement prices, two other such regulations (#1897 and #1898) were not such literal applications of Rule 251. Nevertheless, the Court held:

> That a serious crisis and emergency confronted the Board and Clearing when the Government suddenly and substantially changed the ceiling prices is apparent, and under such circumstances, it was the Board's duty to act in the interest of all traders and of the market in general. Acting under Rule 251, which was binding upon the plaintiffs, the Board had a right to stop trading in the plaintiffs' futures and to liquidate them, as it did. *It had the further right to reinstate such trading when in its judgment the circumstances justified such action.* [Emphasis supplied]
>
> The plaintiffs had agreed to such action when they became members of the contract market and traded thereon. They entrusted their contracts to such bona fide action as the Board and Clearing might take in the interest of the market, in "any emergency or otherwise." From the allegations of the amended complaint, we find nothing in the action of the Board and Clearing that would in any manner vitiate the action they took, in the absence of conduct amounting to fraud. 164 F.2d at 819.

Thus, the Court interpreted Rule 251 very broadly to carry out its purposes, that is, to permit the Board in an emergency to forbid trading in a futures contract except for liquidation purposes, and to make regulations in regard to deliveries and settlement prices, as well as to

BLEED THR

stop all trading activities of all sorts to meet the emergency.

It was held in *Case & Company, Inc., et al.* v. *The Board of Trade of the City of Chicago,* U.S.D.C., N.D. Ill., E.D., No. 73C 1457, February 27, 1974, appeal pending:

> Plaintiffs argue that the Board's power [under its emergency rule 251] is restricted to closing the Exchange, stopping trading in a commodity, modifying the terms of delivery or setting settlement prices when trading is ended. I cannot agree.
>
> In keeping with the purposes of the Commodity Exchange Act the boards of trade must have broad powers to deal with emergencies; to maintain an orderly market, prevent unreasonable fluctuations in price, price manipulations, corners, and other market disruptions. A restrictive interpretation of Rule 251 would seriously impede the performance of the Board's duties under the Act. The Commodity Exchange Authority has interpreted Rule 251 as giving "broad authority to take action under emergency situations to assure the maintenance of an orderly market." As noted previously, this determination must be given weight, particularly when the interpretation furthers the purposes of the Act.

The Department of Agriculture has for over 25 years joined in the interpretation of the Board's Rule 251 which would permit the action taken. In fact, CEA's telegram of June 21, 1973, set forth above, urged the very action which the Board adopted and itself cited Rule 251 as authorizing such action.

The Commodity Exchange Commission has not been furnished any basis for questioning at this late date this long-standing interpretation of the Board Rule. In *Cargill, supra,* the Court indicated that in the absence of any

BLEED THROUG

allegation of fraud a court action alleging solely the violation of this rule through the issuance of trading restrictions, should be dismissed. Compare with *Daniel, supra.* See also *Case & Co., supra.*

Conclusion

In the instant proceeding there has been no allegation of fraud or bad faith on the part of the Board of Trade, nor is there any evidence of such which has come to our attention.

In the absence thereof and in light of the above factual analysis, the Commission has no reason to believe that the Board of Trade violated its rule when it acted in June, 1973 to limit trading in soybeans. Accordingly, it is hereby ordered that the Application for Institution of a Proceeding filed by applicant Robert Lagorio should be and is hereby denied.

Issued: February 20, 1975

COMMODITY EXCHANGE COMMISSION
Ervin L. Peterson, Chairman, designee of the Secretary of Agriculture
Joseph J. Saunders, Commissioner, designee of the Attorney General
Samuel B. Sherwin, Commissioner, designee of the Secretary of Commerce

BLEED THROU

Exhibit B

In the United States Court of Appeals

For the Seventh Circuit

No. 75-1523

ROBERT LAGORIO, individually and on behalf of those who at the close of trading on June 21, 1973 held future contracts for July, August soybeans on the Board of Trade of the City of Chicago,

Plaintiffs-Appellants,

v.

THE BOARD OF TRADE of the City of Chicago and FREDERICK G. UHLMANN, THOMAS A. GELDERMANN, DAVID F. GOLDBERG, WALTER M. GOLDSCHMIDT, WILLIAM D. HAGERTY, JR., DANIEL G. KELLY, ARCH J. REIMANN, HOWARD A. STOTLER, LEE B. STERN, ROTCHFORD L. BARKER, SIDNEY C. HAMPER, RICHARD W. ROSE, and JON VAN WAMBECK, individually and in their official capacities with the Board of Trade of the City of Chicago,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 73 C 2508
HUBERT L. WILL, *Judge.*

ARGUED JANUARY 12, 1976 — DECIDED FEBRUARY 13, 1976

Before CASTLE, *Senior Circuit Judge,* PELL and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* Plaintiff is a trader on the Chicago Board of Trade who contends that a suspension of trading ordered under the Board's emergency rule was unauthorized by the rule and amounted to market manipulation in violation of 7 U.S.C. § 13(b). The District Court entered summary judgment for the defendants, which we affirm.

BLEED T

On June 21, 1973, plaintiff held two futures contracts to buy July 1973 soybeans and two contracts to buy August 1973 soybeans. That day the Board's directors suspended trading in futures contracts for July, August, and September 1973 soybeans, allowing only liquidation of existing contracts and new sales for actual delivery.[1] The directors' action was taken in response to a telegram from the Administrator of the Commodity Exchange Authority stating that "an emergency situation exists in soybeans and soybean meal futures" and requesting the Board to take precisely this action "under your Rule 251 or other appropriate rule."[2] The existence of an emergency is undisputed. Shortly after the directors acted, a price decline began, and on July 11 plaintiff was forced by his inability to meet margin requirements to liquidate at a substantial loss. There is a dispute about whether the price decline was due to the suspension of trading or an export embargo imposed on June 27.

The District Court stayed the proceedings pending a response by the Commodity Exchange Commission to plaintiff's application for the institution of disciplinary proceedings against the defendants. *Cf. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973). The Commission denied plaintiff's application, holding that Rule 251 authorized the Board's action. The District Court then granted summary judgment in favor of the defendants.

Plaintiff filed this action for damages against the Board and its directors on behalf of himself and others similarly situated. Since the District Court failed to make a class determination, we treat this as an action by the named plaintiff only, rather than a class action.

---

[1] The Board's organization, the regulatory scheme, the nature of futures contracts, and trading practices are described in *Case & Co.* v. *Board of Trade*, 523 F.2d 355, 358-359 (7th Cir. 1975).

[2] At that time Rule 251 provided in pertinent part as follows:

"Emergencies.—The Board shall have power . . . to stop trading . . . in any of the future contracts of any commodity, by reason of any emergency or otherwise, and to make such Regulations in regard to deliveries and settlement prices as it may deem proper because thereof. All Exchange contracts shall be subject to the exercise of such power."

The rule has since been amended to express the Board's emergency powers in broad general terms. See *Case & Co., supra* n. 1, 523 F.2d at 363.

IROUGH

BLEED THRO

Case & Co. v. *Board of Trade,* 523 F.2d 355, 360 (7th Cir. 1975).

Although plaintiff alleged in his complaint that the directors' action exceeded their powers under Rule 251 and amounted to market manipulation in violation of 7 U.S.C. § 13(b), he did not allege that the directors acted in bad faith. Compare *Daniel* v. *Board of Trade,* 164 F.2d 815, 819-820 (7th Cir. 1947). The only inference that can be drawn from the undisputed facts, the directors having merely acceded to the Administrator's request, is one of good faith.

Plaintiff concedes, as he must in view of *Daniel* v. *Board of Trade, supra,* 164 F.2d at 819, that Rule 251 allowed the Board to suspend all trading except sales for liquidation, but he argues that the Board could not also except from the suspension new sales by owners of the physical commodity. (In fact, no new sales by owners of the physical commodity took place between the time the Board suspended trading and the time plaintiff liquidated his holdings.)

In *Case & Co.* v. *Board of Trade, supra,* we held that Rule 251 grants the Board "broad and flexible powers . . . to insure an orderly market and prevent manipulation," 523 F.2d at 362. We also held that "[t]he construction placed upon its own rule by the Board over many years is very persuasive if not controlling." *Id.* at 363. In the case at hand, an affidavit by the president of the Board lists nine instances between 1936 and 1955 in which the Board took the same action it took here, and additional instances in which it allowed liquidation sales only. Added weight is given the Board's interpretation by the concurrences of the Administrator and the Commission. See *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 305 (1973), in which the Supreme Court stressed the Commission's expertise in construing the rules of commodity exchanges, and *Case & Co.* v. *Board of Trade, supra,* 523 F.2d at 361, in which this court said the Administrator's views "may be looked to for guidance." As in *Case & Co.,* we conclude that the Board's action was authorized by Rule 251.

As we noted earlier, there is a dispute about whether the Board's action caused the price decline. The plain-

IGH

BLEED THROU

tiff argues that if this causal connection exists, the Board's action amounted to manipulation in violation of 7 U.S.C. § 13(b). He relies on *Cargill, Inc.* v. *Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971), in which the court defined manipulation as intentional conduct "which has resulted in a price which does not reflect basic forces of supply and demand." We have found no authority for applying this definition to actions taken in good faith by a commodity exchange such as the Board in the exercise of its regulatory duties.[3] Inevitably, these actions sometimes affect price. Yet we cannot believe that Congress intended by adopting section 13(b) to impose liability for the good faith performance of regulatory duties imposed by the same statute. See 7 U.S.C. §§ 7, 7a. The contrary instruction urged by the plaintiff here would deter vigorous regulatory action, and like the construction of Rule 251 urged by the plaintiff in *Case & Co.*, "would impair the Board's ability to perform its statutory duties." 523 F.2d at 362. We therefore hold that the Board is not guilty of market manipulation when it acts in good faith under Rule 251. *Cf. Daniel* v. *Board of Trade, supra*, 164 F.2d at 819-820.

We conclude, on the basis of the undisputed facts, that the defendants did not violate Rule 251 or engage in market manipulation. The summary judgment in their favor is therefore affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

[3] We note that the section of the Act providing for cease and desist orders by the Secretary of Agriculture or the Commission against manipulation (7 U.S.C. § 13b) specifically exempts contract markets (perhaps because section 13a provides for cease and desist orders against contract markets), while the provision making manipulation of price an offense (7 U.S.C. § 13(b)) does not contain such an exemption.

USCA 4159—The Scheffer Press, Inc., Chicago, Illinois—2-13-76—250

Exhibit C

Opinion by Judge Tone

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 13, 19 76

DOCKETED by [illegible]
on [illegible] 19 76

Before

Hon. LATHAM CASTLE, Senior Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

ROBERT LAGORIO, etc., et al.,
Plaintiffs-Appellants,

No. 75-1523 vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO and WARREN W. LEBECK, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division
No. 73 C 2508
Hubert L. Will, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

FILED
MAY 27 1976
MICHAEL RODAK, JR., CLERK

No. 75-1655

In the
Supreme Court of the United States
October Term, 1975

ROBERT LAGORIO,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al.

Respondents,

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Philip F. Johnson
John H. Stassen
Attorneys for Respondents

Kirkland & Ellis
Suite 5800
200 E. Randolph Drive
Chicago, Illinois 60601

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

QUESTION PRESENTED 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 3

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Cargill, Inc. v. *Board of Trade of the City of Chicago*, 164 F.2d 820 (7th Cir. 1947), *cert. denied*, 333 U.S. 880 (1947) 4

Case & Co., Inc. v. *Board of Trade of City of Chicago*, 523 F.2d 355 (7th Cir. 1975) 4

Daniel v. *Board of Trade of the City of Chicago*, 164 F.2d 815 (7th Cir. 1947) 4

STATUTES

Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) 2-4

Section 5(d) [7 U.S.C. § 7(d)] 2

Section 5a(8) [7 U.S.C. § 7a(8)] 2

Section 8a(6) [7 U.S.C. § 12a(6)] 2

Section 9(b) [7 U.S.C. § 13(b)] 2-3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1655

ROBERT LAGORIO,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al.

Respondents,

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Board of Trade of the City of Chicago and the thirteen individual Directors named in the complaint (hereinafter collectively referred to as the "Board"), submit that the petition for writ of certiorari is without merit and should be denied.

QUESTION PRESENTED

This case does not raise the "Questions Presented" framed in the petition (p. 2). The petitioner's first "Question" portraying the decision below as granting the Board an "exemption" from the laws prohibiting price manipulation is both contrived and sensational. Similarly, the presumptions in petitioner's second "Question" that a manipulation had occurred and that he was injured there-

by were expressly rejected as factually unsupported by the Court of Appeals.

The only issue presented is whether the lower court committed reversible error by not holding the Board liable for damages to the petitioner under the Commodity Exchange Act when the Board complied with an emergency telegram from the Act's Administrator specifying certain limitations upon new market participation that he considered necessary to prevent a distortion or manipulation of prices on the Board.

STATUTE INVOLVED

The Board and its Directors have federally-created duties under the Commodity Exchange Act [7 U.S.C. §1 *et seq.*] to maintain a fair and orderly market. Section 8a(6) of the Act [7 U.S.C. §12a(6)], for example, authorizes the federal regulator under the Act to alert the Board whenever the threat of a market disorder or manipulation is perceived by the agency. The Board, in turn, is required by section 5(d) of the Act [7 U.S.C. §7(d)] to provide for the prevention of manipulation or corners on the Board and, pursuant thereto, has adopted internal rules to detect, remedy or punish violations of that nature. Finally, section 5a(8) of the Act [7 U.S.C. §7a(8)] places an affirmative duty on the Board to administer and enforce those rules with reasonable diligence. This is the pertinent legal framework for the events surrounding the case, including the Board's receipt of a "§8a(6)" notice from the Act Administrator and its subsequent enforcement pursuant to §5a(8) of those rules adopted under §5(d) of the Act.

Petitioner's reliance upon section 9(b) of the Act [7 U.S.C. §13(b)] for a civil remedy is inapposite on

BLEED THROUGH

its face in that it provides solely for criminal sanctions. The Court of Appeals in fact, rejected section 9(b) as a basis for suit (p. A13).

STATEMENT OF THE CASE

Petitioner's Statement (pp. 3-4) contains a number of inaccuracies or omissions. For example, petitioner's case hinged upon the theory that the Board's action allowed a certain class of persons (sellers owning the actual commodity) to continue to trade freely, thus depressing the market price. The record established and the Court of Appeals found, however, that no such sellers engaged in new trading following the Board's action. At another point in the Statement, petitioner says that the Act Administrator intended that the Board's action would depress prices. The evidence of record, on the contrary, is that the Administrator sought merely to prevent a manipulation or market disorder on the Board. Similarly, petitioner misstates the decision of the Court of Appeals in order to give it the coloration of an "exemption" ruling in favor of the Board.

REASONS FOR DENYING THE WRIT

Petitioner's argument for granting the writ is without merit. His characterization of the lower court's ruling as "exempting" the Board from the laws against market manipulation is simply a contrivance, bearing no resemblance to the actual finding that the Board's action in response to the Act Administrator's telegram was a valid and lawful exercise of its duty under the Commodity Exchange Act to maintain a fair, orderly market and to *prevent* manipulative conduct.

The Board's action has already been reviewed exhaustively by at least three tribunals. The Commodity Exchange Commission, an agency under the Commodity Exchange Act which is independent of the Act Administrator, reviewed the Board's conduct while this case was pending in the District Court. The Commission concluded that the Board had not violated the Act. Subsequently, both the District Court and the Court of Appeals reviewed the matter, including the Commission's report, and likewise found in the Board's favor. None of those rulings purported to "exempt" the Board from the manipulation provisions of the Act but simply acknowledged the fact that the Board, as a licensed "contract market," is obliged to take steps in the market from time to time which will maintain or restore orderly trading. Such actions are not "manipulative" within the meaning of the Act but are, on the contrary, anti-manipulative in purpose.

The Commodity Exchange Commission, the District Court and the Court of Appeals utilized well-established legal principles in reviewing the Board's actions. The cases cited by those tribunals have served as guideposts for the Board and other exchanges for many years. *Daniel* v. *Board of Trade of the City of Chicago,* 164 F.2d 815 (7th Cir. 1947); *Cargill, Inc.* v. *Board of Trade of the City of Chicago,* 164 F.2d 820 (7th Cir. 1947), *cert. denied,* 333 U.S. 880 (1947). And those precepts remain valid today. See *Case & Co., Inc.* v. *Board of Trade of the City of Chicago,* 523 F.2d 355 (7th Cir. 1975). Petitioner does not assert, nor do we find, any conflict of authority between the circuits on the legal issues in this case.

Petitioner, in summary, has shown no special and important reasons why a writ of certiorari should issue. No new or novel federal question is posed; no issue was

BLEED THROUGH

resolved below in a way that conflicts with the rulings of this Court; and no conclusion was reached that so far departs from the accepted and usual course of judicial proceedings that the exercise of this Court's power of supervision is called for.

CONCLUSION

Accordingly, the Respondents respectfully urge that the petition for writ of certiorari be denied.

Respectfully submitted,

PHILIP F. JOHNSON
JOHN H. STASSEN
Attorneys for Respondents

KIRKLAND & ELLIS
Suite 5800
200 E. Randolph Drive
Chicago, Illinois 60601